Dawn Trucking Inc. *and* Mickoy Holness. Cases 29–CA–171337 and 29–CA–174915

August 17, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On February 8, 2017, Administrative Law Judge Benjamin W. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Dawn Trucking Inc., Rosedale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the Building Material Teamsters Local 282, International Brotherhood of Teamsters or any other labor organization.

(b) Conditioning offers of reinstatement to employees upon rejection of the Building Material Teamsters Local 282, International Brotherhood of Teamsters as their bargaining representative.

(c) Bypassing the certified bargaining representative, Building Material Teamsters Local 282, International Brotherhood of Teamsters, and dealing directly with bargaining unit employees with regard to the terms and conditions of their employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Rosedale, New York facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Excel Container, Inc*., 325 NLRB 17 (1997). In addition, we shall modify the judge's recommended broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted under the circumstances of this case, and shall substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979). Finally, we shall substitute a new notice to conform to the Order as modified.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by Respondent's authorized representative, copies of the attached notice to the last known addresses of all current employees and former unit employees employed by the Respondent at any time since November 6, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 17, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Building Material Teamsters Local 282, International Brotherhood of Teamsters or any other labor organization.

WE WILL NOT condition offers of reinstatement to you upon your rejection of the Building Material Teamsters Local 282, International Brotherhood of Teamsters as your bargaining representative.

WE WILL NOT bypass the certified bargaining representative, Building Material Teamsters Local 282, International Brotherhood of Teamsters, and deal directly with you regarding your terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

DAWN TRUCKING INC.

The Board's decision can be found at www.nlrb.gov/case/29-CA-171337 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273-1940.

Kimberly Walters, Esq., for the General Counsel.
Richard Ziskin, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on December 15, 2016.[1] The General Counsel alleges that, since November 6, 2015, the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging its employees Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier (the drivers) because of their support for and activities on behalf of the Building Material Teamsters Local 282, International Brotherhood of Teamsters (the Union). The General Counsel further alleges that, on February 16, the Respondent violated Section 8(a)(5), (3), and (1) of the Act by dealing directly with certain drivers regarding offers to reinstate them upon the condition that they reject the Union. For the reasons described below, I find that the Respondent violated the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the post-hearing briefs that were filed by the parties, I make these

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties further agree that the Union is a labor organization within the meaning of Section 2(5) of the Act. [Jt. Exh. 1.]

II. PROCEDURAL HISTORY

Since the Respondent has raised an issue of timeliness under Section 10(b) of the Act, the procedural background is provided in detail as follows:

On March 7, Mickoy Holness, an individual, filed the original charge in case 29–CA–171337 alleging that, after November 6, 2015, the Respondent violated Section 8(a)(1) by refusing to dispatch employees for work because they unanimously elected the Union as their bargaining representative in an NLRB election conducted on November 5, 2015. [GC Exh. 1(d).]

On March 17, Holness filed a first amended charge in case 29–CA–17137 alleging the same cessation of work as a violation of Section 8(a)(3) and (1). [GC Exh. 1(a).]

On April 25, Holness filed the original charge in case 29–CA–174915 alleging that, on February 16, the Respondent violated Section 8(a)(5), (3), and (1) by dealing directly with employees concerning their terms and conditions of employment and promising benefits in exchange for employees disavowing support for the Union. [GC Exh. 1(i).]

On May 23, Holness filed a second amended charge in 29–CA–17137 alleging that the Respondent discharged employees after the November 5, 2015 election in violation of Section 8(a)(5) (as well as Section 8(a)(3)). [GC Exh. 1(m).]

On August 30, an order consolidating cases, consolidated complaint and notice of hearing (the complaint) issued in cases 29–CA–171337 and 29–CA–174915. [GC Exh. 1(q).] On December 9, the Respondent filed a third amended answer denying the essential allegations of the complaint. [GC Exh. 1(z).] The complaint alleged that, on about November 6, 2015, the Respondent violated Section 8(a)(5), (3), and (1) by discharging the drivers. However, in its posthearing brief, the General Counsel moved to withdraw the allegation that these drivers were discharge in violation of Section 8(a)(5).[2] The complaint further alleged that, on about February 16, the Respondent violated Section 8(a)(3) and (1) by offering to reinstate all the drivers except Rosario upon the condition that they reject the Union. Finally, the complaint alleged that, on February 16, the Respondent violated Section 8(a)(5) and (1) by bypassing the Union and dealing directly with employees regarding their term and conditions of employment.

III. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is in the business of carrying dirt and other fill material to and from construction sites in dump trucks. [Jt. Exh. 1 ¶ 1.]

The Respondent is owned by Henry Burey and he manages the operation. [Tr. 66, 71–72.] [Jt. Exh. 1 ¶ 5.] The parties stipulated and I find that Burey is a supervisor and agent within

[1] All dates refer to 2016 unless indicated otherwise.

[2] I hereby grant the General Counsel's motion to withdraw the allegation that the Respondent violated Sec. 8(a)(5) and (1) by discharging the drivers on November 6. As discussed below, I have found that the Respondent violated Sec. 8(a)(3) and (1) by discharging the drivers and the finding of a 8(a)(5) violation would add nothing to the remedy.

the meaning of Section 2(11) and 2(13) of the Act. [Jt. Exh. 1 ¶ 5.]

Prior to November 5, 2015, the Respondent employed six drivers (named above) who operated the trucks. Burey also drove a truck occasionally. [Tr. 16–17, 35–36, 66.] The Respondent generally maintained a fleet of seven trucks. [Tr. 16, 34.] Burey testified that he bought a new (eighth) truck, but returned it in September 2015. [Tr. 79.] On jobs that were not paid a prevailing wage, the drivers earned $27 per hour with the exception of Holness who earned $30 per hour. [Tr. 22, 74.] [Jt. Exh. 1—Exh. B.] The drivers were paid more for prevailing wage jobs. [Tr. 74.]

Burey was responsible for assigning work to the drivers. [Tr. 14, 33.] At the end of each workday, Burey sent text messages to each driver indicating the client, starting time, and location for their next day of work. If the Respondent did not have work for a driver because of the weather or because business was slow, Burey sent a text message to the driver telling him so. [Tr. 14–15, 33–34.]

In addition to the drivers, the Respondent employed Burey's wife Karlene Burey. Karlene did not drive a truck or have a commercial driver's license. Burey described Karlene's job as running errands. [Tr. 66–67.] [Jt. Exh. 1 Exh. B.]

In about September 2015, Holness contacted Union Business Agent Jay Strull. [Tr. 17.]

Thereafter, the Union filed a petition with the NLRB to represent a unit of drivers employed by the Respondent.[3] Pursuant to that petition, an election was scheduled for November 5, 2015. [Tr. 46–47.] [Jt. Exh. 1 ¶¶ 6–7.]

Prior to the election, employees received a document with their paychecks that stated as follows [Tr. 19, 37.] [GC Exh. 2.]:

DAWN TRUCKING

There are certain facts that the employees of Dawn Trucking should keep in mind when considering how to vote in the election this week:

• The company has been able to compete better against union competitors because it has not been restricted by union work rules that do not put money in your pocket.

• 'The company does not presently have the client base that will continue to retain the company if the union is voted in.

• The law does not require an employer to grant any concession to the union, to increase pay, to improve a benefit or to agree to any union demand.

• If the union gets in and makes demands which the company does not agree to, it has the right to strike which means you lose your pay and the company can stop paying your health insurance premiums. The company also have the legal right to hire permanent replacements for any striker. When the strike is over, the company does not have to fire the replacement to make way for the returning striker.

• A union has the right fine members for crossing a picket line even as much as the amount of money they earn while working. The fines may be collected in court.

• If the union gets in it is legal to require that everyone must join and that dues get automatically deducted from your paycheck.

• It is not easy to just try the union to see if you like it. Once it is in, it is very difficult for employees to get rid of it and you could end up paying dues for your entire time with the company.

• If you vote against the union the union cannot take it out on you or retaliate against you for voting No. The Labor Board protects you.

• The fact that I agreed to an election and gave your home addresses to the union does not mean that I favor the union coming in here, The Labor Board and the Labor Board rules require turning over your home Addresses to the Union.

Holness testified that, the day before the election, Burey spoke to him and drivers Thomas, Coore, and Wittier in the yard. According to Holness, Burey told them he would shut down if they went Union. [Tr. 18, 28–31.] Thomas generally corroborated the testimony of Holness. Although Thomas did not place Coore in the yard during this conversation and recalled it taking place a couple of days before the election, Thomas testified that Burey told them he was not interested in going Union because the Union does not provide work and he has no connections to get union work. According to Thomas, Burey said he would have no work for the drivers and would rather shut down than go Union.[4] [Tr. 37–38.]

Burey did not specifically address and deny this conversation with drivers in the yard. Burey did testify he told Thomas that "we were not going forward. I was worried about taking work and there could be a strike or it would lead a company to financial problems."[5] [Tr. 77.]

On Thursday, November 5, 2015, a representation election was conducted at the end of the day among employees in the driver unit. [Tr. 40.] The election tally of ballots was 6-0 in favor of union representation. [Jt. Exh. 1 ¶ 7.]

Before he voted in the election, Thomas received his dispatch assignment for the following day. When Thomas arrived home after voting, he received a call from Burey. Burey told Thomas, "Straight across the board, we're done." [Tr. 40.]

[3] The parties stipulated and I find that the following unit is appropriate:

All full-time and regular part-time drivers employed by the Respondent and working at or out of the Respondent's Rosedale facility, located at 155-49 Broad Street, Rosedale, New York.

[4] I credit Thomas's account of the conversation because his recollection is consistent with what Respondent previously announced in writing and he (Thomas) testified with assurance and detail. The complaint does not allege that Burey's comments were unlawful and I make no finding in this regard. I note, however, that the statement may be evidence of motive even if it is not alleged as a threat. *Jones Plumbing Co., Inc.*, 277 NLRB 437, 440 (1985).

[5] It is not entirely clear whether Burey was referring to the same conversation in the yard that was testified to by Thomas and Holness.

Burey did not have any other communication with the drivers or the Union about the discharge, layoff, lock out, and/or refusal to assign work to the drivers. [Tr. 72.]

Thomas worked his assignment on November 6, 2015. [Tr. 40.] Holness did not work on November 6, 2015, because of a medical emergency. [Tr. 20.]

After November 6, 2015, Burey did not assign work to the drivers. [Tr. 20, 40–41, 72.] [Jt. Exh. 1 ¶ 9.] Burey admits he performed some work as a driver after the election. [Tr. 67–69.] The General Counsel introduced an invoice from the Respondent to client Triumph Construction Corp. (Triumph) that showed the Respondent dispatched one truck to Triumph (operated by Burey) on the following dates: November 9–13, 16–20, 23–25, 27, and 30, 2015. [GC Exh. 5.]

On direct examination, Burey explained his decision to stop assigning work to the drivers as follows [Tr. 72.]:

> A. During that time I was not in the best of health. Prior to a couple of weeks before I got Notices from the NLRB I actually checked in the hospital with some health issues. And for the first time I realized that I'm getting to be an old guy and so at that time I didn't want to take on additional work that Drivers would strike and Union would shut the business down. It was basically a lock out. We had not hired Replacement Drivers or—
>
> Q. So since November 6th, 2015 has Dawn Trucking hired any Drivers?
>
> A. No, we have not hired any Drivers since November.

On cross-examination, Burey testified as follows [Tr. 78-79]:

> A. So on your direct examination you testified that when you ceased dispatching Drivers it was, a quote, "basically a lock out". Is that your testimony?
>
> Q. Yes, it was.
>
> Q. What do you mean by lock out?
>
> A. Well, like I said I was having health issues. And—you know—I just wanted to retire and stop the operation.
>
> . . .
>
> Q. So when did you declare that it was a lock out?
>
> . . .
>
> A. Basically, before all of this—before October—before the NLRB letters. You know—I was close to the Drivers and they all know that I have no family member that was going to take over my business. They knew that my wife was near retirement. They knew I was having health issues, as I was approaching 63. And I told the Drivers that I had no long term plan for my business. They knew that before August. So I even had to buy a new truck that I returned in February to the—in September.
>
> Q. So you're saying that you considered it a lock out back in October?
>
> A. I was in the process of closing my business before this -- before the allegation and before any letters from the NLRB or before this thing happened.

On November 12, 2015, Respondent attorney Peter Sullivan sent an email to Union Attorney Travis Mastroddi that stated in part, "We are not sure yet where we are going on Dawn." [GC Exh. 3.]

On November 19, 2015, the NLRB certified the Union as the bargaining representative of the driver unit. [Jt. Exh. 1 ¶ 7(c).]

In late-November or early-December 2015, Holness contacted Strull and asked whether there was any progress with the Respondent or if they were going to start working. Strull indicated that he had not heard anything yet. [Tr. 21.]

Thomas testified that, in late-January, Burey called and stated the following [Tr. 41.]:

> And he said that he was interested in starting back up his Company. But he was only interested in taking on two guys, me and Kevin [Wittier]. And that he had found out who the terrorists were and he wasn't interested in anyone else.

Thomas told Burey he had obtained a different job a week ago and would not be available to work. [Tr. 42.] At trial, Burey was asked about this conversation and did not deny that it occurred as Thomas testified. [Tr. 77.]

On February 16, Burey sent the following text message to drivers Holness, Coore, and Perez [Jt. Exh. 1 ¶ 10—Exhibit A.]:

> I want to start work again @ $27.00 per hour, no union rates no benefits, no prevailing wage Reply by tomorrow if interested 2/17/16 by 4.00 pm

Burey testified that he arranged for a small amount of work in February and (as discussed below) in August because he was advised that he could terminate any backpay owed to certain drivers by offering them reinstatement. [Tr. 73, 75–77.] However, Burey specifically testified that these offers of reinstatement occurred after he was advised that a charge had been filed with the NLRB. [Tr. 79–80.] As indicated above, the first charge was not filed until March 7. [GC Exh. 1(a).]

Burey testified that he selected a wage rate of $27 per hour because that was the wage rate drivers were earning before he stopped assigning them work. According to Burey, he would have paid Holness $30 per hour if he had accepted reinstatement because that was what Holness had been earning previously (even though the text message referenced a $27 per hour wage rate). [Tr. 73–74.] Burey further testified that he mentioned "no prevailing wage" because the jobs he arranged were not prevailing wage jobs.

None of the drivers accepted the February 16 offer to resume work with the Respondent. [Tr. 73–74, 77.]

On March 9, having learned from Strull that the Respondent might resume work, Mastroddi prepared a letter that Strull signed and sent to Burey. [Tr. 49–50.] The letter stated [GC Exh. 4.]:

> It has come to our attention that Dawn Trucking, Inc. ("Dawn") has again begun or is soon to begin employing drivers after having shrunk its contingent of drivers down to one (yourself) shortly after a majority of its drivers voted to select Local 282 as their bargaining representative. Pursuant

> to the November 19, 2015 Certification of Representative issued by Region 29 of the National Labor Relations Board (copy enclosed), Local 282 is the exclusive collective bargaining representative for Dawn's drivers.
>
> Please accept this letter as the Union's request to meet and bargain over the terms and conditions of employment for Dawn's drivers, and please contact me in order to schedule dates to meet in April. In addition, please furnish a list of all drivers currently employed by Dawn, including each driver's addresses, rate of pay, and a description of any fringe benefits or other compensation Dawn presently provides each.

Subsequent to this letter, Mastroddi had phone and email communications with Sullivan, and they ultimately scheduled a bargaining session for May. [Tr. 50–51, 58.] [R. Exh. 3.] The parties held this one bargaining session and no others. [Tr. 59–60, 75.]

In August, Sullivan asked Mastroddi whether an offer to resume work should be made to the Union or directly to the drivers. Mastroddi responded that the Respondent could contact the drivers directly. [Tr. 59–64.] [R. Exh. 4.]

By letters dated August 30, having been advised that his February offer may not have been sufficient to terminate backpay, Burey sent new offers to Holness and Thomas. [Tr. 75.] These letters stated [R. Ex. 1-2.] [Jt. Exh. 1 ¶ 12.]:

> This letter is to inform you that we are offering immediate and unconditional opening of employment with Dawn Trucking Inc. at the same terms and conditions of employment that you enjoyed when you last worked here. Please contact us at 718-464-5752 by September 15, 2016 in order to arrange the details of your return to employment. We anticipate that if you contact us expeditiously you will be able to return to work by September 15 at the latest. If we do not hear from you by September 15, 2016, we will assume that you are not interested in working with us.

Burey testified that he made these new offers of reinstatement because "the previous offer in February might not have been an offer" and he wanted to terminate the running of backpay. [Tr. 72–75.]

Neither Holness nor Thomas accepted Burey's August offer to resume work with the Respondent. [Tr. 27, 44, 75.]

Burey testified that the Respondent hired no drivers after November 6, 2015, and, except the small amount of work performed in November 2015, February, and August, the Respondent has performed no other trucking work. [Tr. 72, 76–77.] The trucks are parked in the yard and the Respondent has returned the license plates of four of the seven vehicles. [Tr. 77, 80.] The record contains payroll records that show Burey and Karlene remained employed and were paid by the Respondent from February 14 to April 30. [Jt. Exh. 1 Exh. B.]

ANALYSIS

I. 10(B) TIMELINESS

As a preliminary matter, I will address the Respondent's affirmative defense that the allegations are time barred by Section 10(b) of the Act. The only allegation that was arguably filed more than 6 months from the date of the alleged unlawful conduct is the allegation that the drivers were discharged in violation of Section 8(a)(5). On March 17, within the 10(b) period, Holness filed a first amended charge alleging that the Respondent ceased dispatching work to the drivers in violation of Section 8(a)(3) and (1). On April 25, within the 10(b) period, Holness filed a charge alleging that the Respondent violated Section 8(a)(5), (3), and (1) by, on February 16, dealing directly with employees concerning their terms and conditions of employment and promising benefits (i.e., employment) in exchange for employees disavowing support for the Union. On May 23, arguably outside the 10(b) period, Holness filed a second amended charge alleging that the discharge of the drivers violated Section 8(a)(5) (as well as Section 8(a)(3)). However, the General Counsel moved in its posthearing brief to withdraw the 8(a)(5) discharge allegation and I have granted that motion. Accordingly, the complaint contains no allegation that was arguably filed outside the 10(b) period.

The Respondent nevertheless contends that Section 10(b) applies because the complaint refers to the Respondent's conduct on November 6, 2015, as "discharges" and a charge did not allege the Respondent's unlawful conduct as "discharges" until May 23. However, a complaint is not restricted to the precise language of the charge so long as the complaint allegation is closely related in fact and law to an allegation in a timely filed charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959); *Redd-I, Inc.*, 290 NLRB 1115 (1988); *Old Dominion Freight Line*, 331 NLRB 111 (2000). Here, the Respondent's position amounts to little more than an exercise in semantics. The March 17 charge accurately described the Respondent's conduct as unlawful in that "no employee was dispatch (sic) after November 6, 2015." The Respondent's conduct could, alternatively, have been described as "layoffs" (i.e., not based on employee misconduct) or "discharges" (i.e., based on employee protected activity) because it effectively separated the drivers' employment. Regardless of the specific language, the facts and law at issue in the violation that was alleged in the March 17 charge are identical to those at it issue in the violation that was ultimately alleged in the complaint. The Region's decision to use the word "discharged" in the complaint instead of "ceased dispatching" or "laid off" was not confusing or prejudicial, and dismissal of the allegation on that basis would require the unwarranted elevation of form over substance.

II. DIRECT DEALING AND CONDITIONAL OFFER OF REINSTATEMENT

It is a violation of Section 8(a)(5) and (1) of the Act for an employer to deal directly with employees regarding reinstatement and the terms thereof without notifying and offering to bargain with the union that represents those employees. *Clemson Brothers, Inc.*, 290 NLRB 944, 945 (1988) (employer violated Section 8(a)(5) by offering reinstatement to employees upon terms that were different than those in the collective-bargaining agreement).

It is also a violation of Section 8(a)(3) and (1) of the Act for an employer to condition reinstatement on an agreement by employees to cease engaging in union activity or to reject the union and the contractual terms the union has negotiated. *Clemson Brothers, Inc.*, 290 NLRB at 945 (employer "conditioned rehiring of the laid-off employees on their willingness to

waive contractual . . . benefits. Such actions, as found by the judge, were clearly discriminatory as well as inimical to the collective-bargaining process"); *Vulcan-Hart Corp.*, 263 NLRB 477 (1982) (reinstatement offer to local union president was unlawful where it was conditioned upon his agreement not to run for union office); *Kerrville Telephone Co.*, 209 NLRB 328 (1974) (reinstatement offer was unlawful where it was conditioned upon employee not talking to other employees about the union).

Here, on February 16, Burey sent a text to three drivers that stated, "I want to start work again @ $27.00 per hour, no union rates no benefits, no prevailing wage Reply by tomorrow if interested 2/17/16 by 4.00 pm." The critical phrase in this text is "no union rates no benefits." The General Counsel contends that by conditioning reinstatement on "no union rates no benefits," the Respondent communicated an intention to deal directly with the drivers regarding their compensation and reject or exclude the Union from that process.

The Respondent contends that Burey's text, while perhaps not artfully drafted, was merely a statement of fact and law. That is, there was no union contract in place (at least not yet) and the Respondent was required by law to maintain drivers' previous compensation until negotiations resulted in a good-faith impasse or a collective-bargaining agreement. The Respondent admits that the text was inaccurate in offering reinstatement to Holness at a wage rate of $27 per hour instead of the $30 per hour rate he had been earning, but contends that this was simply an unintentional error.

My initial reaction upon first reading the text in question at the start of trial with limited context was to interpret the phrase "no union rates no benefits" in the manner asserted by the General Counsel. The literal meaning of "no union rates" is "rates not negotiated by a union." However, the context must be considered in evaluating the Respondent's contention that Burey merely confirmed the status quo with no reference to the Union's future participation in setting drivers' wages.

That context supports the literal meaning of the statement and the General Counsel's theory of the case. Prior to the election, the Respondent issued a document to drivers which stated that the Respondent was more competitive without union work rules and did not possess a "client base that will continue to retain the company if the union is voted in." According to Thomas, whom I credit, Burey verbally reiterated that he had no connections to obtain union work, would have no work for the drivers if they went union, and would rather shut down than go union. Thus, the Respondent's message was fairly clear that the company would not and probably could not continue in business if drivers elected the Union. That being Respondent's position, and there being no indication to the contrary in Burey's February 16 text, it would be reasonable for the drivers to interpret the offer of "no union rates" as a permanent condition of reinstatement (otherwise, according to the Respondent, it could not stay in business). This interpretation of the text was even more likely in the context of Burey's comment to Thomas (in late-January) that only certain drivers were being offered reinstatement because he (Burey) found out who "the terrorists were" (inferring that Burey was attempting to exclude from the workforce those drivers who were most responsible for the organizing effort).

The Respondent relies on *U.S. Ecology Corp.,* 331 NLRB 223 (2000), where in different circumstances the Board found other bargaining violations but dismissed an allegation of direct dealing. The instant case is distinguishable with regard to the direct dealing allegation. In *U.S. Ecology Corp.*, the employer sent a letter to striking employees (not their union) in response to employee inquiries about returning to work. This letter stated that strikers could return to work with their former wages and benefits. However, the employer only offered reinstatement on such terms "for the time being," whereas the Respondent did not indicate that "no union rates" was a temporary condition and subject to bargaining. Further, the employer in *U.S. Ecology Corp.* had an established bargaining relationship with the union when it responded directly to employee inquiries, whereas here the Respondent did not.[6] Indeed, the union in *U.S. Ecology Corp.* accepted the offer of reinstatement on behalf of employees the day after the letter was sent by the employer. Finally, in *U.S. Ecology Corp.*, the employer's letter contained no inference that the union was being excluded from the bargaining process (unlike here where the Respondent referred to "no union rates").

In sum, unlike in *U.S. Ecology Corp.*, the drivers in this case were much more likely to interpret Burey's text as an offer of reinstatement that permanently conditioned employment on the acceptance of wage rates not negotiated by the Union. This would tend to erode the Union's position as the drivers' exclusive bargaining representative. Accordingly, the Respondent violated Section 8(a)(5), (3), and (1) of the Act by dealing directly with the drivers regarding their terms of employment and conditioning their employment on exclusion of the Union from the bargaining process.

III. DISCHARGE OF THE DRIVERS

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging the drivers when it stopped dispatching them for work after November 6, 2015. The Respondent asserts as defenses that its conduct amounted to a lawful closure of its business or a lawful lockout. I reject both defenses for the reasons described below.

A. Closure

An employer may cease doing business entirely even if the decision to do so is based on antiunion considerations. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). An employer may exercise this right to completely liquidate its business more out of "spite against the union than by business reasons." Id. at 272. Further, a partial closure only violates Section 8(a)(3) if it is motivated by a purpose and can reasonably be foreseen to chill unionism in the employer's remaining operations. Id. at 275. However, a closure or partial closure

[6] On November 12, 2015, Sullivan sent an email to Mastroddi that stated, "We are not sure yet where we are going on Dawn." The email was vague and Sullivan did not commit to engaging in negotiations with the Union. Further, the Respondent was not responding to driver inquiries.

will violate the Act if it is not permanent.[7] *Plaza Properties of Michigan, Inc.*, 340 NLRB 983, 989 (2003). The Supreme Court made clear in *Darlington Mfg. Co.* that it was not authorizing "a shutdown where the employees, by renouncing the union, could cause the plant to reopen." 380 U.S. at 273. Indeed, "[s]uch cases would involve discriminatory employer action for the purpose of obtaining some benefit in the future from the employees." Id.

Here, the Respondent does not vigorously deny that its conduct was based on union considerations and the evidence supports a finding that the Respondent stopped assigning work to the drivers because they elected the Union as their bargaining representative.[8] Prior to the election, the Respondent threatened to shut down if employees elected the Union. Burey admits he told Thomas they "would not be going forward" if the Union won the election because he (Burey) was concerned about a strike or some other business complication caused by the Union. After the election, Burey did, in fact, stop assigning work to the drivers. Indeed, Burey called Thomas the evening immediately after the election and said, "straight across the board, we're done."

Based on the foregoing, it is clear that the Respondent stopped assigning work to drivers on the basis of antiunion considerations. However, this does not render the Respondent's conduct per se unlawful because, as noted above, an employer may completely close its business for any reason or partially close its business if it is not done to chill the union activity of employees in the remainder of its operations. Perhaps surprisingly, the law appears to grant an employer the nuclear option of refusing to employ employees at all if to do so would require the employment of employees who are unionized. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965).

However, the evidence does not support a finding that the Respondent intended to exercise the nuclear option. On February 16, Burey texted three drivers and offered to start assigning them work with "no union rates no benefits" Thus, Burey revealed that the shutdown was only temporary and he unlawfully conditioned the resumption of work on drivers' rejection of the Union (and any wages and benefits the Union might negotiate on their behalf). As noted above, the Supreme Court was clear in stating that an employer acts unlawfully by closing temporarily and conditioning the resumption of work on rejection of the union. *Textile Workers v. Darlington Mfg. Co.,* 340 NLRB at 983. Further, Burey told Thomas in late-January that only certain drivers would be offered reinstatement because he found out "who the terrorists were" (which I infer to be a reference to drivers that Burey perceived as primarily responsible for the organizing effort). Thus, the partial closure was not only a temporary closure, but implemented in a discriminatory manner that could be expected to chill the union activity of employees. By this conduct, the Respondent violated Section 8(a)(3) and (1) of the Act.

In so finding, I specifically conclude that the Respondent maintained an unlawful object from November 6, 2015, to (at least) February 16. I do not credit Burey's testimony that he was in the process of retiring before the Union came on the scene, acted in accordance with that intention by not assigning work to the drivers after the election, and only offered employees reinstatement on February 16 to limit backpay. The evidence does not indicate that the Respondent was winding down its business before the election.[9] Rather, the Respondent's written communication to drivers during the organizing campaign indicated a desire to remain in business with an unrepresented workforce. Further, Burey specifically testified that he only took action to terminate the running of driver backpay once he learned that a charge had been filed with the NLRB. The first charge was not filed until March 7. Accordingly, while this rational (i.e., limiting backpay) may have been the reason why the Respondent offered to reinstate drivers in August, it was not the reason for offering to reinstate drivers in February. Rather, I believe the Respondent was simply acting upon an ongoing desire to remain in business on a nonunion basis in selectively offering reinstatement to certain drivers with "no union rates no benefits."

Although Burey did indicate before the election that he would rather shut down if drivers voted for the Union, he tied this alleged intent to an inability to obtain work. The evidence did not establish that the Respondent had any difficulty obtaining work after the election and the Respondent had no significant contact with the Union before February 16. Accordingly, the Respondent did not actually have any reason to close and

[7] As discussed below, the Respondent argued at trial that its conduct amounted to a lawful lockout. Such an assertion is factually incongruent with the Respondent's defense that it permanently went out of business. Lockouts are undertaken by an employer to compel a union to accept a bargaining position or to avoid disruption of the business. See *Wayneview Care Center*, 356 NLRB 154 (2010). Either way, the purpose assumes an intent to continue in business. However, for reasons discussed below, I find that the Respondent did not, in fact, lock out the drivers. Accordingly, I do not rely on the Respondent's assertion that a lockout occurred as a reason for rejecting the defense of partial closure.

[8] The Respondent relies on *Darlington Mfg. Co.* in arguing that its conduct was lawful regardless of any antiunion animus. The General Counsel, citing *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 33 (1967), asserts that the Respondent's conduct is so "inherently destructive" of employee rights that no evidence of motivation is necessary to find a violation. However, I find it unnecessary to rule on this issue. See *Century Air Freight, Inc.*, 284 NLRB 730 (1987) (Board refused to pass on whether conduct was "inherently destructive" because employer admitted that it subcontracted its trucking operation and all unit work in order to avoid a potential strike). Here, as in *Century Air Freight*, Burey virtually admits that he stopped assigning work to the drivers because they elected the Union and he was concerned about the Union disrupting his business. Where a discriminatory motive is admitted, it is redundant to find it inherent. However, I do note that, if the Respondent's conduct were considered "inherently destructive" under the *Great Dane* analysis, its business justification would weigh little against the comparative impact of its antiunion conduct because the Union was not actually planning a strike or any other action. *Hawaiian Dredging Construction Co., Inc.*, 362 NLRB No. 10 (2015) (under *Great Dane*, Board weighs destructive impact against asserted business justification of alleged unlawful conduct).

[9] The fact that the Respondent returned a newly purchased truck does not indicate that it was winding down the business. It may indicate that Burey thought twice about expanding the business, but not that he was in the process of retiring.

Burey could easily have believed it was still possible to rehire drivers without dealing with the Union. Once the charge was filed and the Union sent a letter reminding the Respondent of the Union's status as drivers' bargaining representative, the Respondent may have decided to terminate the business except for the attempt to resume in August (to limit backpay). As noted below, the remedy in this case may ultimately reflect such a pivot in the Respondent's position. However, the evidence indicates that the Respondent, at least from November 6, 2015 through February 16, maintained an unlawful object of continuing in business with drivers as employees but without the Union that was elected to represent them.

B. Lockout

As indicated above, I find that the Respondent did not, in fact, lock out the drivers. Burey did not notify the drivers or the Union that he was implementing a lockout. Burey did not tell anyone what he wanted to accomplish by refusing to dispatch the drivers after the election or what the Union could do to bring an end to this alleged lockout. On cross-examination, when Burey was questioned about the "lockout," he testified regarding his alleged desire to retire and close. The legality of the Respondent's asserted closure is addressed above.

Even if the Respondent's conduct could be considered a lockout, it was not a lawful one and would not make out a valid defense. "The Board has held, with judicial approval, that an employer violates Section 8(a)(5) and (1) of the Act when it locks out employees for the purpose of evading its duty to negotiate with their bargaining representative or compelling acceptance of its unfair labor practices." *Royal Motor Sales*, 329 NLRB 760 (1999). A lockout may also violate Section 8(a)(3) if it was implemented with a desire to discourage union membership. Id. Thus, partial lockouts are unlawful if they are based upon employees' respective union activity or otherwise lack a legitimate business justification. *Wayneview Care Center*, 356 NLRB 154 (2010) citing *Field Bridge Associates*, 306 NLRB 322, 334 (1992) enfd. 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). Further, "a fundamental principle underlying a lawful lockout is that the Union must be informed of the employer's demands, so that the Union can evaluate whether to accept them and obtain reinstatement." *Dayton Newspapers*, Inc., 339 NLRB 650, 656–658 (2003), enfd. In rel. part 402 F.3d 651 (6th Cir. 2005).

Here, the Respondent stopped assigning work to the drivers before negotiations began and, therefore, the alleged lockout was not in support of a bargaining proposal. Further, the Respondent's conduct was not a legal "defensive lockout" designed to preempt union action that might disrupt the business. Although Burey expressed concern about a strike or some other union obstruction, the record is devoid of any evidence that such union action was forthcoming. *Wayneview Care Center*, 356 NLRB 154 (2010) (defensive lockout not lawful where there was no evidence that the union was planning a strike or picketing). Moreover, when Burey offered certain drivers their jobs back, it was based upon his perception of their respective union activity and conditioned upon their acceptance of terms that would not be negotiated by the Union. Such a partial lockout based on discriminatory considerations and unilaterally established terms of employment would not be exculpatory under the Act.

CONCLUSIONS OF LAW

1. The Respondent, Dawn Trucking Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Building Material Teamsters Local 282, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) Discharging employees because they elected the Union as their bargaining representative.

(b) Conditioning offers of reinstatement to employees upon rejection of the Union as their bargaining representative.

4. By bypassing the Union and dealing directly with its employees with regard to offers of reinstatement upon terms not negotiated by the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, which shall include a mailing to drivers of the attached notice marked "Appendix."

Having concluded that the Respondent unlawfully discharged Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier on November 6, 2015, it must offer them reinstatement and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them (subject to the observations below).

The make whole remedy shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), the Respondent shall compensate Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 29 a report allocating backpay to the appropriate calendar year for each employee. The Re-

gional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In ordering that the drivers be made whole, I am mindful that there was a significant reduction of driver work after the election and that just one person (Burey) performed it all. However, a reduction of available work will not be grounds for reducing backpay if the reduction of work was the result of conduct that constitutes an unfair labor practice. In re *Weldun Intern, Inc.,* 340 NLRB 666 (2003). Here, Burey testified that he was uncomfortable accepting work once his drivers unionized and I have found this conduct, in refusing to assign work to the drivers, unlawful. Accordingly, the reduction of available work following the November 5, 2015 election was the result of the Respondent's unlawful conduct and should not be used as a basis for reducing the backpay obligation owed to the drivers.

Likewise, the Respondent's February 16 reinstatement offer to drivers shall not terminate the entitlement of those drivers to backpay and reinstatement because the offers were conditional and unlawful. *A.P. Painting & Improvements, Inc.*, 339 NLRB 1206 (2003) ("a reinstatement offer containing what amounts to a violation of the Act is not a valid offer").[10]

Although the Respondent was not relieved through February 16 of an obligation to make the drivers whole and reinstated them, the evidence indicates that the Respondent has not performed trucking work since about August and made additional offers of reinstatement (which were not accepted) on August 30. Regardless of the events from November 2015 to February 16, the Respondent does retain the right to go out of business entirely and the rejection of an unconditional offer to return work will terminate an employee's right to reinstatement and backpay. Accordingly, to the extent backpay and reinstatement may be impacted by the August 30 offers of reinstatement and/or the Respondent's apparent termination of its business, those issues may be explored in a subsequent compliance proceeding. An order requiring the mailing of the notice to employees, as referenced above, is appropriate because the continuation of the Respondent's business is uncertain.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

[10] Since I have found the February 16 offers of reinstatement to be unlawful, I have not addressed whether the offers were otherwise invalid as a basis for terminating the running of backpay. It could be argued that the February 16 offer to Holness was invalid because Holness was not offered reinstatement at his previous wage rate ($30 per hour). It could also be argued that all the February 16 offers were invalid because drivers were only given until 4 p.m. the next day to accept. If the Board were to overturn my finding that the February 16 offers of reinstatement were unlawful, these issues regarding the impact of the February offers on the backpay remedy may be addressed in subsequent compliance proceedings.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Dawn Trucking Inc., Rosedale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the Building Material Teamsters Local 282, International Brotherhood of Teamsters or any other union.

(b) Conditioning offers of reinstatement to employees upon rejection of the Building Material Teamsters Local 282, International Brotherhood of Teamsters as their bargaining representative.

(c) Bypassing the certified bargaining representative, Building Material Teamsters Local 282, International Brotherhood of Teamsters, and dealing directly with bargaining unit employees with regard to the terms and conditions of their employment.

(d) In any other manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier reinstatement to their former positions or, if that position no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier it will be allocated to the appropriate periods.

(d) Compensate Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Rosedale, New York facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by

[12] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix" to all current and former unit employees employed by the Respondent at any time since November 1, 2015.

Dated, Washington, D.C. February 8, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW UNDER SECTON 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, lay off, refuse to assign work or otherwise discriminate against any of you for supporting the Building Material Teamsters Local 282, International Brotherhood of Teamsters or any other union.

WE WILL NOT deal directly with you when you are represented by a union such as the Building Material Teamsters Local 282, International Brotherhood of Teamsters for purposes of collective bargaining.

WE WILL NOT offer you reinstatement that is conditioned upon your rejection of a union such as the Building Material Teamsters Local 282, International Brotherhood of Teamsters as your exclusive bargaining representative or offer you reinstatement that is conditioned upon acceptance of wages that have not been negotiated by a union such as the Building Material Teamsters Local 282, International Brotherhood of Teamsters as your exclusive bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier to their former jobs or, if those jobs no longer exist, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate Mickoy Holness, Clayton Thomas, Damion Coore, Jose Perez, Juan Rosario, and Kevin Wittier for the adverse tax consequences, if any of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

DAWN TRUCKING INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29–CA–171337 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.